

THE BARENBLATT OPINION

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IN JUNE 1954, Mr. Lloyd Barenblatt, being summoned by a House Subcommittee on Un-American Activities, was asked, with compulsion to answer, whether or not he then was, or had ever been a member of the Communist Party. In response to this demand, Mr. Barenblatt informed the Subcommittee of his belief that in so far as the question referred to activities protected by the first amendment, the requirement that he answer it was a serious violation of the Constitution. He, therefore, refused to answer. He made it certain that he was not appealing to the fifth amendment, which might justify a refusal to testify on the basis of his private right not "to be a witness against himself in any criminal case." He was, he said, appealing primarily to the first amendment in order to protect the Constitution from violation by Congress. His plea, as so made, was not that of a private individual defending his own interest. Quite the contrary was true. At great personal sacrifice, he spoke as a free citizen, sharing in the governing of his country, and seeking to do his duty to the government, as he understood that duty to be prescribed by the Constitution. Mr. Barenblatt knew, from common knowledge of the past behavior of the Subcommittee, that, if he persisted in his refusal, he would be publicly exposed to disrepute, to unproven accusations of disloyalty, which might wreck his career. And, further, he was officially warned that refusal would make him liable to citation for "contempt of Congress." But, in the face of this danger and this threat, he held his ground, pursuing what the Opinion of the Supreme Court calls, "his private interest." He was, therefore, cited, tried, convicted, and condemned to pay a fine and spend six months in jail. On appeal, that judgment was affirmed by the Federal Court of Appeals for the District of Columbia Circuit, with four judges dissenting. And, on further appeal to the Supreme Court, the judgment was re-affirmed, again with four Justices dissenting.¹

The following paper is an attempt to establish two contentions. I will argue (1) that a critical examination of the Opinion of the Court shows that a re-hearing of the case is needed; and (2) that the procedures of the Subcommittee were such that the citation for Contempt of Congress cannot be justified.

I. THE OPINION

The House Committee on Un-American Activities, whose Subcommittee questioned Mr. Barenblatt, was created, and has been continued in being,

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¹ 360 U. S. 109 (1959), *rehearing denied* 80 Sup. Ct. 40 (1959).

through a Congressional delegation of authority, referred to by the Opinion of the Court as "Rule XI." It reads as follows:

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Opinion, as it affirms the citation and conviction of Mr. Barenblatt under that Rule, undertakes to answer the charges which, on his behalf, are brought against the rule, and against its application by the Subcommittee. The charges and their answers are given in three separate sections of the Opinion, entitled respectively (1) "Subcommittee's Authority to Compel Testimony," (2) "Pertinency Claim," and (3) "Constitutional Contentions."

The first section arrives by argument at the conclusion that, "... the Rule [XI] cannot be said to be constitutionally infirm on the score of vagueness."

In the second section the question at issue is defined by the Opinion in the words: "What we deal with here is whether petitioner was sufficiently apprised of 'the topic under inquiry' thus authorized 'and the connective reasoning whereby the precise questions asked relate[d] to it.'"

Here the Opinion concludes that "petitioner's contentions on this aspect of the case cannot be sustained."

The finding of the third section is that "... the provisions of the first amendment have not been offended."

This criticism of the Opinion will not deal directly with the third section argument about the scope and meaning of the first amendment. That issue is safely in the hands of Mr. Justice Black and the other Justices whose superb dissent will be honored and heeded so long as Americans seek to understand what their Political Freedom is.

But the discussions of vagueness and lack of pertinency in Rule XI, and in the Subcommittee's form of communication with its witness, are so unconvincing as to call for serious reconsideration. In this procedural area, the Opinion's lack of cogency appears in many different, though related forms.

1

Before entering upon its argument, the Opinion defines a "framework of constitutional history, practice, and legal precedents" which are intended to clarify the discussion that follows. Two factors in that framework need critical examination.

First, since the Subcommittee announces that it is inquiring into "Communism in Education," the Opinion faces the question: "Does the first amendment permit legislative investigation of education?" And to this query, the framework gives two answers. One of them is:

"Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions."

The second remark is:

"But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher."

The second of these statements seems clearly valid. In principle, the first amendment gives to the freedom of a teacher only the same protection which it gives to the freedom of every other citizen.

But the statement that, "broadly viewed," our legislature cannot investigate the teaching which is done in our schools and colleges is so misleading that it starts the Opinion's argument off in the wrong direction. Congress has authority to appropriate money for the support and improvement of teaching, and, hence, to "investigate," as it seeks for wisdom in such action. It did so, long ago, in the Morrill Act, which providing carefully that certain subjects should be taught in the institutions benefited by it, played a large part in building up our State institutions of higher learning. Many other federal appropriations have served the same purpose. It is to be hoped that, in the future, appropriations will be vastly increased by a national government whose legislature is gifted with understanding of what education is trying to do and how its purposes may be accomplished. The question at issue in the *Barenblatt* case is not, "Does the Constitution forbid the Congress to investigate 'teaching'?" The question is, "Are such investigations kept within the limits prescribed by the Constitution?"

2

Throughout the Opinion's argument a serious difficulty arises from the fact that discussion of the first amendment in the third section is so sharply separated from the preceding discussions of vagueness and irrelevance that the two parts seem to have no logical significance for one another. This is evidenced by the fact that in the earlier sections the first amendment is not even mentioned. And that means that, as between the Subcommittee and a witness who pleads that its questioning violates that amendment the chief source of vagueness and irrelevance is completely ignored. This complaint concerning the formal structure of the Opinion is, it is true, very general. But it may serve to indicate a failure of the Opinion's argument which we shall find, point by point, invalidating its contention that the authority and the procedures of the Subcommittee are not "infirm on the score of vagueness" and "lack of pertinency."

3

The argument of the Opinion concerning the charge of vagueness in the phraseology of Rule XI begins with a recognition that the *Watkins* Opinion had seriously pressed that charge. But, while admitting the Rule's vagueness, the Court proceeds to show that the defect is lessened or eliminated (1) by

"a persuasive gloss of legislative history" and (2) in the procedure of the Subcommittee, by "the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves." But these considerations when carefully examined will be found to pile up more vagueness and lack of pertinency rather than to diminish them. In this respect, the Opinion is strangely self-defeating. In its hands, the question, "Are you a member of the Communist Party?" becomes, procedurally, so involved in confusing implications that, for a person who is pleading the first amendment, it is incapable of direct answer.

The Opinion's first line of argument is introduced as follows:

Granting the vagueness of the Rule, we may not read it in isolation from its long history in the House of Representatives. Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions. The Rule comes to us with a "persuasive gloss of legislative history," *United States v. Witkovitz*, 353 U.S. 194, 199, which shows beyond doubt that in pursuance of its legislative concerns in the domain of "national security" the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist Activities in this country.

The words "pervasive authority to investigate" reveal the fact that the Opinion is here discussing an issue which is wholly distinct from that which is at stake in the *Barenblatt* case. The question here is not that of "authority to investigate." That is granted. But the crucial issue is that of "compelling testimony" when one investigates. And the scope of "compulsory power" is far narrower than that of "investigating power." The authority of Congress to demand information relevant to its legislative purposes has, in many ways, been successfully challenged under the Constitution. For example, the President has, on occasion, denied to legislative Committees information from his files. So, too, have the Departments of State, Justice, and War. And, as the Opinion tells us, the first and fifth amendments, acting for very different reasons, assure to the citizens of our Electorate the same authority to refuse to supply useful information. In a word, it is, presumably, true that "the right to investigate" is as wide as "the right to legislate." But the right to "compel testimony" is narrower. It is hard to tell what "pervasive" means. But in any case, its use in relation to Congressional authority to "compel testimony" does not seem to be justified.

But an equally misleading feature of the Opinion's historical interpretation of Rule XI is that, following the same procedure as that of the Subcommittee, it substitutes for the term "Un-American propaganda activities" by which the Rule designates the objects of its investigation, the term "Communist activities." It would seem that both the Committee and the Opinion find the meaning of the rule, not in the text which defines it, but in the exaggerated and question-begging title "Committee on Un-American Activities," which mis-calls it.

Are the two terms, "Communist activities" and "Un-American propaganda activities," identical in reference and scope?

The change from "Un-American" to "Communist" may be justified so far as it indicates that the Committee has chosen to investigate only a part of the field assigned to it. In the course of our history, remote and near at hand, many American citizens who had no connection with Communist theory or action have engaged in "propaganda" against "the principle of the form of government guaranteed by our Constitution." And, as a nation, we have gloried in the belief that such criticism is sanctioned and approved by the Constitution itself. Under Rule XI these non-Communist critics were made open to investigation by the Committee. But under current conditions of international strife and danger, the decision to limit investigation to "Communists only" can, of course, be justified. It may not, however, be used as a way of escape from the ambiguities of "un-American." The word "Communist" is, at least, as vague as that for which it substitutes. But, on the whole, the change from "un-American" to "Communist" does not seriously increase, just as it does not decrease, the weight of the charge of vagueness.

But the elimination of the word "propaganda" from the phrase "propaganda activities" is so transforming in its effect upon the Rule's meaning that it invalidates, on the score of vagueness and irrelevance, both the procedures of the Subcommittee and the Opinion which interprets and justifies them. By that wholly unexplained verbal substitution, all forms of Communist activity are thrown open to the Committee's investigation. Sabotage, espionage, infiltration, planning and attempting to overthrow the government by force and violence, are all lumped together, in the same package, with the "propaganda activities" to which the text of Rule XI alone refers. To a witness pleading the first amendment, the meaning of which is completely dependent upon a sharp and clear distinction between (1) the activities of speech, press, assembly, and petition and (2) the other activities which are here classified with them, the effect upon communication with his questioner is one of confusion and unintelligibility. Here is vagueness which would wreck any inquiry.

4

In defense of its contention, and of the proceedings of the Subcommittee, against the petitioner's charge of vagueness, the Opinion uses two arguments which show how deeply misunderstandings of principles interfere with clarity of communication between questioner and questioned in these proceedings.

First, after reference to the *Watkins* complaint of vagueness, the Opinion says:

Petitioner also contends, independently of *Watkins*, that the vagueness of Rule XI deprived the Subcommittee of the right to compel testimony in this investigation into Communist activity. We cannot agree with this contention, which in its furthest reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances.

Here is substantive confusion of a kind which makes genuine communication between the Subcommittee and its "witness" impossible. Mr. Barenblatt is protesting only that the committee is deprived of authority to compel testimony about such "propaganda" activities as are protected by the first amendment. But the Opinion interprets his protest as meaning that a committee, authorized by Congress to investigate all "Communist activities," would be debarred, on grounds of his protest, from investigating the long list of activities such as sabotage, espionage, and so on, which are not protected by the first amendment. Misunderstanding can go no further than this.

Second, summing up the results of its study of the "gloss of legislative history," the Opinion says:

The essence of that history can be briefly stated . . . From the beginning without interruption to the present time . . . the Committee has devoted a major part of its energies to the investigation of Communist activities.

And to this statement it adds:

In the context of these unrelenting pursuits, the House has steadily continued the life of the Committee at the commencement of each new Congress; it has never narrowed the powers of the Committee, whose authority has remained throughout identical with that contained in Rule XI; and it has continually supported the Committee's activities with substantial appropriations.

And, still further, the consideration of "vagueness" closes with the following words:

In this framework of the Committee's history we must conclude that its legislative authority to conduct the inquiry under consideration is unassailable, and that . . . the Rule cannot be said to be constitutionally infirm on the score of vagueness. The constitutional permissibility of that authority otherwise is a matter to be discussed later. (The reference here is to the third section on "Constitutional Contentions.")

Do these words give an adequate reply to the *Watkins* suggestion that Rule XI is "infirm on the score of vagueness"? In answer to that question three remarks may be made.

1. The *Watkins* Opinion had said, only two years earlier, that the words "propaganda" and "Un-American" and "the principle of the form of government as guaranteed by our Constitution are so 'nebulous' that it would be difficult to imagine a less explicit authorizing resolution." The Justices who made that criticism knew very well that for two decades Congress had persistently held fast to the program of Rule XI. But to them, and to others who agree with them, the legislative history which was well known by them gives no new reason why the criticism should be withdrawn.

2. All that the *Barenblatt* Opinion accomplishes, in its discussion of vagueness in Rule XI, is to eliminate the phrases against which complaint is made and to substitute for them the wider and even more ill-defined phrase "Communist

Activities." By means of that transformation a "witness" before the Subcommittee becomes a "defendant" charged with wholly undefined participation in what the Opinion calls a "movement" while the Subcommittee speak of it as a "conspiracy." He is confronted with the accusation that he, together with hundreds of millions of others throughout the world, is engaged in multifarious activities directed toward the destruction of the freedom-loving governments of the world.

3. The statement that "the legislative authority" of the Committee "to conduct the inquiry under consideration is unassailable" is clearly valid if taken as a definition of the relationship between Congress and its Committee. But, when taken as a definition of the relationship between Congress and the Judiciary, it is just as clearly invalid. The Courts, under the Constitution, have authority to "assail" any act of Congress or of its Committees which, on the score of vagueness, is found to violate the provisions of the Constitution. And on that issue the *Watkins* assault has not been repelled.

5

A third instance in which vagueness about the first amendment leads to procedural vagueness, both in the actions of the Subcommittee and in the Opinion which sustains them, appears in the assertion that the "witness," by refusing to testify about the "Communist Party" membership attributed to him, had "shut off the Subcommittee at the threshold" of its investigation.

That assertion is made by the Opinion, in the following passage:

The record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party. That there was also testimony on the abstract philosophical level does not detract from the dominant theme of this investigation—Communist infiltration furthering the alleged ultimate purpose of overthrow. And certainly the conclusion would not be justified that the questioning of petitioner would have exceeded permissible bounds had he not shut off the Subcommittee at the threshold.

By what reasoning process does the Opinion arrive at the conclusion that it was the witness who was responsible for bringing the investigation to an end? Mr. Barenblatt had refused to answer a question about his beliefs and associations in belief. But the Chairman had stated that the witness had been summoned to testify on the ground that he had "information about Communist Activities in the United States of America, particularly while he attended the University of Michigan." Here was a wide and relevant field of inquiry which, when kept within "permissible bounds" could not be restricted by the first amendment, on which the witness had rested his appeal.

Mr. Barenblatt did not "shut off" the investigation. The decision to do that was made by the Subcommittee, and made with complete disregard of its own avowed purpose. The Committee had arrived, not at the "threshold of its investigation," but at its deliberately chosen end. It was able to cite

an American citizen for "contempt of Congress," and to make sure that he would be fined and sent to jail. And that being provided for, it was willing to stop.

6

In its third section, as contrasted with discussion of vagueness and irrelevance, the Opinion finds that the authority of the Committee, and hence of its Subcommittee, is limited by the first and fifth amendments. And in explaining those limitations, the Opinion falls into an ambiguity so deep that at every point, the communication between Subcommittee and witness becomes vague and unintelligible.

With respect to the limitations in question, the Opinion says:

The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgressed the provisions of the first amendment, which of course reach and limit congressional investigations . . .

The Court's past cases establish sure guides to decision. Undeniably, the first amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the first amendment, unlike a proper claim of the privilege against self-incrimination under the fifth amendment, do not afford a witness the right to resist inquiry in all circumstances. Where first amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

The reference here made to the "balancing" of competing interests which are alike protected by the Constitution is so significant as revealing a vagueness in the Opinion's "sure guides to decision" that the writer of this paper feels compelled to interpolate here a brief substantive remark which may be regarded as a foot-note to Mr. Justice Black's powerful dissent as it attacks the "balancing" doctrine of the Opinion's third section.

Two conflicts of interest, the Opinion says, come to the Court for "balancing." In one case, care for the "national security" is found to be in conflict with the first amendment freedoms of speech, press, assembly, and petition. In the other case, the same "national security" is found to be endangered by the fifth amendment provision that no one may be "compelled in any criminal case to be a witness against himself." And, at this point, the Opinion makes an amazing and confusing decision. It declares that, when confronted by the same national danger, the fifth amendment must always prevail over the care for national security, but that the first amendment, when confronted by the same danger, may be required to give way to it. Here is a second balancing which weighs the most fundamental values of our American Plan of Government. As measured on the same scales, the interest of a citizen, and of the nation, that he and all his fellow-citizens shall have proper freedom from abridgment of speech, press, assembly, and petition, is found to be less in

constitutional value than the interest of a private individual in his safety from the requirement that he testify against himself when brought to trail in a criminal case. That is the bewildering outcome of those "sure guides to decision" by which our Courts are now accustomed to interpret and to protect our Political Freedom, as guarded by the Constitution.²

II. THE SUBCOMMITTEE

As we turn now to the procedures of the Subcommittee in its questioning of Mr. Barenblatt, we shall find that here the same use of the term "Communist activities" to indicate the scope of the Committee's jurisdiction has the same "infirmity on the score of vagueness" as that which affects the Opinion of the Court. Evidence in support of that statement is to be found in the series of relevant happenings which are listed by the Court and by Mr. Justice Black's dissent.

1. Mr. Barenblatt, being present at the hearing while earlier witnesses were questioned, heard the testimony of "witness Crowley," identifying him as a former member of an alleged "Communist student organization at the University of Michigan . . ."

2. He also heard the Chairman of the Subcommittee as he opened the hearing with an explanation of the purpose and justification of the current investigation.

3. The Opinion of the Court quotes excerpts from that explanation, which included a reading of Rule XI. The other excerpts which bear most directly on the issue of vagueness read as follows:

a) "From time to time the committee has investigated Communists and Communist activities within the entertainment, newspaper, and labor fields, and also within the professions and the Government."

b) "It has been fully established in testimony before congressional committees and before the courts of our land that the Communist Party of the United States is part of an international conspiracy which is being used as a tool or weapon by a foreign power to promote its own foreign policy and which has for its object the overthrow of the governments of all non-Communist countries, resorting to the use of force and violence, if necessary. . . ."

c) "The committee is equally concerned with the opportunities that the Communist Party has to wield its influence upon members of the teaching profession and students through Communists who are members of the teaching profession. Therefore, the objective of this investigation is to ascertain the character, extent, and objects of Communist Party activities when such activities

² The reader, if he chooses, will find a more detailed discussion of the "balancing" doctrine in an article published in the *University of Chicago Law Review*, Spring, 1953, under the title, "What Does the First Amendment Mean?" It was a discussion of the concurring opinion of Mr. Justice Frankfurter, in the *Dennis* case. In an abbreviated form, the same criticism appeared in the *Nation*, December 12, 1953, where it was called, "Freedom and The People."

are carried on by members of the teaching profession who are subject to the directives and discipline of the Communist Party."

4. Mr. Barenblatt, when called to testify not as a "witness," but as a "defendant" told of his official connections with the University of Michigan and Vassar College. But, when asked, "Are you now, or have you ever been, a member of the Communist Party?" he found, in one of the references of that question, a violation of the first amendment, which forbids legislative abridgment of the freedom of speech, press, assembly, or petition. He knew, of course, that the first amendment does not forbid official inquiry, with compulsion to answer, into other "Communist activities" which the Chairman had listed as being within the field of the Committee's authority to investigate. But his refusal had no reference to those other activities which are not included within the scope of the first amendment's authority.

It would be hard to measure the depth of the confusion and consequent irrelevance which, in this situation, the question, "Are you a member of the Communist Party?" creates between the Subcommittee and its witness. The Subcommittee is asking, "Are you an active participant in those 'Communist Activities' by which a great conspiracy, at home and abroad, is trying to destroy our government?" Mr. Barenblatt replies, "You have no authority, by your compulsion, to abridge my freedom, or that of my fellow citizens, in the field of speech, press, assembly, or petition." At one point, the question and the answer meet. But, at all other points, no genuine communication is taking place. And the trouble is not that Mr. Barenblatt has given the wrong answer. It is that the Subcommittee is asking a wrong question.

Here, then, created by the use of the term "Communist activities," without proper differentiation, is the basic vagueness which renders "infirm" the questioning of the Subcommittee and, with it, the Opinion of the Court. The question, as put to Mr. Barenblatt, with compulsion to answer "Yes" or "No," was, in the objectionable sense, "complex." It needed many answers rather than only one, as different phases of its meaning came under investigation. It contained within its scope as many different general inquiries as the number of different types of Communist activities which the Subcommittee had listed as open to its investigation. And within each of these types were many more concrete inquiries which would be separated from one another by any procedure of genuine investigation. For example, the Committee was asking, in one sentence, the following general questions:

1. Do you believe that our present form of government should be fundamentally changed?

2. Have you joined with others in advocating such a change?

3. Have you engaged with others in violent action to bring about such a change?

4. Have you engaged in espionage to secure, for any enemy nation, information which might help it against us?

5. Have you incited others to criminal action against our government?

6. Are you "subject to the directives and discipline of the Communist Party"?

How can a witness answer, with a single "Yes" or "No," that group of questions? Each of them requires a separate and, it may be, a different answer, or a refusal, on this or that ground, to answer. Lumping them together may serve other purposes. But it cannot serve the purpose of genuine legislative investigation. It does not meet the procedural demand that a witness shall be clearly and concretely informed why a question is asked and what it means. It does not ensure that he be "sufficiently apprised of the topic under inquiry" and "the connective reasoning whereby the precise questions asked relate[d] to it."

The difficulty here suggested is not met by saying that membership in an "international Communist conspiracy" is different in kind from "just an ordinary political party." Whatever difference there is between these groupings is irrelevant to the issue of procedure which is raised by the "complex question." That form of questioning when thrust upon a member of any group, political or non-political, whose activities are multifarious and diverse, is, as such, infirm on the score of vagueness and irrelevance. And, as used by the Chairman of the Subcommittee, with its sweeping assertions concerning activities throughout the world, directed against all the freedom-loving governments, it gives abundant reason why the affirming of the conviction of Mr. Barenblatt should have been reconsidered.

III.

In view of what has been here said about "legislative history" an added remark about "constitutional history" may seem to be out of order. And yet reflection on the *Barenblatt* case carries one's mind almost inevitably back to that of the Hollywood Ten. In that proceeding, the Committee on Un-American Activities revived and raised to a new technological efficiency the long-discredited device of asking, with compulsion to answer, "Are you a member of X Party?" The recollection of that achievement may help us to find our constitutional bearings.

The investigation of Hollywood plays had been suggested by the popular suspicion that some of them were being written and produced with the effect of inciting people to criminal action against the Government of the United States. Here was a question of fact which, on grounds of national security, the legislature might properly investigate, provided its procedures did not violate the rules of the Constitution.

For the discovering of the truth or falsity of the suspicion, the primary procedure open to the Committee was that of reading the plays in question, seeing them produced in public exhibition, securing competent and objective judgment as to their effect upon the actions of those who read, or heard, or

saw them. Against that form of investigation, properly conducted, neither the first amendment nor any other Constitutional principle raises any objection. If, however, no criminal intent or effect is revealed by the plays themselves, no further investigation is, on grounds of security, justified.

But the hearings of the Committee engaged in another form of inquiry which, having no direct relevance to the question of fact, was brutally effective in destroying the freedom, and wrecking the careers, of women and men against whom no relevant accusation had been proven. Openly announcing its intention of "driving out of the industry" writers and producers, the Committee resorted to the device of asking the question, "Are you, or have you been, a member of the Communist Party?" And, by requiring an answer to it, succeeded in sending men to jail, blacklisting others, terrifying an educational industry into feeble and sterile conformity, and thus leading the whole nation into a betrayal of the Constitution. It is this second form of unwarranted investigation whose constitutionality the *Barenblatt* Opinion now affirms.

This paper was written at a time when the possibility of the reversal of the *Barenblatt* decision was officially before the Supreme Court. The writer still hopes that, in consideration of related cases which remain to be decided, the Court will change its mind as to what the first amendment intends to say.